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No. 88-684

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MAINE, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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6p

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This brief is filed pursuant to Rule 22.6 of the Rules of this Court to respond to statements made in petitioners' reply brief that misstate the position taken by the federal respondents before both this Court and the courts below.

1. Contrary to petitioners' claim (Reply Br. 1), our opposition to their petition did not include an argument "not presented to the Court below." As the court of appeals' opinion makes clear, our brief before that court responded in similar fashion to petitioners' assertion that EPA's construction effectively reads Section 110(a)(2)(E) out of the Clean Air Act; in both submissions we referred to instances when EPA must determine that Section 110(a)(2)

(E)'s prohibition on interstate pollution has been satisfied. See Pet. App. A12 ("The Administrator's review of various SIP revisions submitted by states is an ongoing process, and under the Administrator's interpretation the prohibition of § 110(a)(2)(E) is one of the requirements that must be met before he can approve any initial SIP or revision."). On both occasions, moreover, we specifically argued that one such instance is when a State submits a SIP or revised SIP in response to EPA's promulgation of a new NAAQS or a revision to an existing NAAQS.[1] Compare Br. in Opp. 10-11 ("In addition, whenever a new NAAQS is promulgated or an existing NAAQS is revised, EPA must ensure that all SIPs submitted for its review conform to Section 110(a)(2), including paragraph (E)'s prohibition.") with Gov't C.A. Br. 63 ("Similarly, whenever a new NAAQS is promulgated or an existing NAAQS is revised, new State SIPS must be submitted, and the Administrator is to apply the elements of section 110(a)(2), including subsection (E).").

2. There is likewise no basis for petitioners' assertions that "EPA's claim that interstate pollution provisions are implemented whenever air quality standards are adopted or revised is false" or that the notion of "steady review by EPA of interstate pollution has no basis in the agency's construction of the statute" (Reply Br. 1, 2). The views expressed in our brief in opposition and in our court of appeals brief, which the court of appeals adopted, are longstanding.

The three instances cited by petitioners (Reply Br. 2) when EPA has adopted or revised a NAAQS are not to the

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[1] Section 110(a)(1) of the Clean Air Act requires each State to submit a SIP or revised SIP "within nine months after the promulgation of a [NAAQS] (or revision thereof) * * * for any air pollutant" (42 U.S.C. 7410(a)(1)).

contrary. None of those regulations purports to declare all of the applicable requirements of the Clean Air Act triggered by the new or revised standard; they describe only those supplemental requirements peculiar to the pollutant involved. See, *e.g.*, 43 Fed. Reg. 46264 (1978) (emphasis added) ("The regulations promulgated below, *together with the current requirements of 40 CFR Part 51,* set forth the requirements for States to follow in developing, adopting, and submitting acceptable implementation plans for the lead national ambient air quality standards."). Hence, the Act's general requirements for a SIP, including satisfaction of Section 110(a)(2)(E), apply. See 40 C.F.R. 51.110(e) ("The plan for each Region must have adequate provisions to ensure that stationary sources from within that Region will not: (1) prevent attainment and maintenance of any national standard in any portion of an interstate Region or any other Region * * *[;] (2) interfere with measures required to be included in the applicable implementation plan for any such Region to prevent significant deterioration of air quality or to protect visibility."); see also 48 Fed. Reg. 46,152, 46,163 (1983) (listing Section 110(a)(2)(E) as statutory basis for 40 C.F.R. 51.110(e)).[2]

3. Finally, petitioners ignore that EPA has in fact disapproved proposed SIP revisions because of interstate impacts. For example, EPA disapproved a portion of the Indiana SIP because of the State's failure to comply with Section 110(a)(2)(E) (48 Fed. Reg. 5106, 5107 (1983) (proposed disapproval); 53 Fed. Reg. 46,608, 46,612 (daily ed. Nov. 18, 1988) (final disapproval)); and, in disapproving a portion of the Illinois SIP, EPA relied, among other

[2] In the case of EPA's revision of the Clean Air Act's ozone standard, cited by petitioners (Reply Br. 2, citing 44 Fed. Reg. 8202 (1979)), EPA determined that no SIP revisions were required because the federal standard was being relaxed and "States may have more stringent controls than necessary if they choose" (44 Fed. Reg. 8203).

things, on possible interstate impacts (see 48 Fed. Reg. 5110, 5113 (1983) (proposed disapproval); 53 Fed. Reg. 40,415, 40,423-40,425 (1988) (final disapproval)).

For the foregoing reasons, and those stated in our brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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